

NTSB Order No. EA-4135

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 28th day of March, 1994

Respondent.

Docket SE-11672

The respondent has appealed from the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued on November 22, 1991, at the conclusion of an evidentiary hearing.<sup>1</sup> By that decision, the law judge affirmed the Administrator's order suspending respondent's airline transport pilot (ATP) certificate on an allegation of a violation of

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section 91.9 of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91.<sup>2</sup> The Administrator alleged in his order, which was filed as the complaint in this proceeding, that on March 29, 1990, a maintenance worker was injured by jet blast when respondent's Boeing 727 aircraft, Delta Flight 606, made a turn on a taxiway following push back from a gate at LaGuardia Airport, New York.<sup>3</sup> The law judge modified the sanction from a 30-day suspension of respondent's ATP certificate to a 15-day suspension.<sup>4</sup>

According to the maintenance worker, on the day in question he was working fifteen feet above the ground, on a flatbed, preparing for long-term storage of an Eastern Airlines L-1011 aircraft that was parked adjacent to the gate and across from the jetway used by Delta Airlines. The worker recounted that at the time of respondent's push back he was at the nose of the L-1011, covering the left pitot tubes with tape and plastic. He testified that he heard an aircraft start up and then he felt warm air. He turned around and saw a Delta 727 aircraft, two

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<sup>2</sup>FAR § 91.9 [now recodified as § 91.13(a)] provides as follows:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of others."

<sup>3</sup>The Administrator specifically alleged in his order that respondent "applied engine power in such a way as to cause injury to a nearby maintenance worker."

<sup>4</sup>The Administrator has not appealed the sanction modification.

hundred or less feet away, with all three engines running, and with the "exhaust pipes looking right at me." (TR-27).<sup>5</sup>

Believing he did not have enough time to get out of the way, he braced his foot against the control panel of the flatbed and held on to a pitot tube.<sup>6</sup> He described the blast as "tremendous," "loud," and "hot," and asserted that he was "tossed about," causing him to twist his back. The worker immediately reported the incident to both the Delta Airlines station manager and to his supervisor at Eastern Airlines. He testified that because later that day he began to experience back pain, he sought medical attention. He was subsequently retired on disability as a result of the back injury he claims to have sustained.

The gist of respondent's defense is that the maintenance worker was not in the area during the push back and that his injuries are feigned. Neither respondent or his crew recalled seeing a worker on the flatbed, although the first officer did recall noticing the orange covers on the pitot tubes of the L-1011. In any event, they explained that the taxi instructions they received from the tower that day were unusual, in that,

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<sup>5</sup>An FAA inspector testified that the Boeing 727's engines are approximately 13 feet off the ground and the pitot tubes on the L-1011 are about 17 feet off the ground. The worker is 5'8" tall.

<sup>6</sup>He admits that jet blast is a "fact of life" at a congested airport such as LaGuardia, but he claims he has never been hit with as much power as he felt on this day. (TR-84). Joint Exhibit 7, an excerpt from a Delta Operating Manual, warns crews that "[a]ircraft are to be pushed back and positioned in such a manner to preclude jet blast from affecting hangar structures, service road areas, or ground support vehicles and personnel."

instead of being instructed, following push back from the gate, to take the taxiway to their left, they were told to execute a 180-degree turn and follow a different routing to the runway. The crew testified that they were confused and distracted by this unexpected instruction, which respondent had his first officer confirm before he executed the turn. Both he and his first officer asserted that they looked around the area and saw no one.

Both also testified that even if they had seen<sup>7</sup> this worker on the flatbed next to the L-1011 they would have still executed the 180-degree turn because their aircraft was far enough away from the front of the other aircraft to not present a problem -- the first officer estimates they were at least 300 feet away from the L-1011, and respondent estimates he would have been at least 200 feet away. The law judge found, as a matter of credibility, that the maintenance worker was in fact injured as a result of the jet blast associated with the 727's turn following the push back. He concluded that the amount of power used by respondent during the operation must have been excessive.

Respondent contends on appeal that the law judge's determination that he utilized excessive engine power in the operation of the aircraft is not supported by a preponderance of the evidence. In addition, he claims that the law judge's exclusion of certain deposition testimony was so detrimental to his defense as to warrant reversal. The Administrator has filed

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<sup>7</sup> According to the FAA inspector who investigated the incident, before executing the turn the 727 and the L-1011 were "nose-to-nose." (TR-98).

a brief in reply, urging the Board to affirm the initial decision.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified by the law judge with regard to sanction. For the reasons that follow, we deny respondent's appeal.

In the Board's view, there is ample support for the law judge's determination that respondent's operation of his aircraft carelessly endangered the maintenance worker, who, the law judge found, was in fact on the flatbed at the time of respondent's push back and should have been observed by him. Respondent offers us no persuasive reason to disturb the law judge's acceptance, as a matter of credibility, of the maintenance worker's testimony as to his location during the incident. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986). Respondent further argues that assuming the worker was present, the power used to execute the turn would not have endangered the worker, because one of respondent's experts calculated that the aircraft would have been some 285 feet away from the worker. We do not share respondent's belief that his witness' calculations are unassailable. Those calculations were based on an interview with a wing walker conducted two years after the incident, in which he told respondent's expert that he had put the nose gear of the 727 on the centerline of the taxiway nearest the gate before leaving

the area. However, when this wing walker was interviewed by the FAA within weeks of the incident, he admitted that he had only pushed the 727 back until it was just short of that taxiway.<sup>8</sup> According to the FAA inspector's calculations, if the aircraft was disengaged from the tow when it was short of the taxiway, and in light of the fact that respondent would have to move the aircraft forward, towards the L-1011, in order to gain sufficient momentum to make the turn, it is likely that the 727's aircraft's engines were within 100 to 140 feet of the L-1011 after the turn had been completed. In any event, it was within the province of the law judge, as the trier of fact, to reject the distances calculated by the various experts, and credit the worker's testimony that he was hit by a tremendous jet blast. The FAA's calculations are also more consistent with the testimony of the injured worker, the wing walker's post-incident statement, and even respondent, all of whom observed that the 727 was about 200 feet from the L-1011.

Respondent's admission that while executing the 180-degree turn he added power to the number 1 engine at an EPR [engine pressure ratio] value of between 1.2 and 1.3 is supportive of the conclusion that he used excessive thrust in the circumstances, in violation of FAR section 91.9. (TR-263; see also Vol. II, TR-71). The Delta Operating Manual (Joint Exhibit 2) states that "to get the aircraft moving from a stop, careful application of

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<sup>8</sup>This witness testified that the 727 was within "a couple hundred" feet of the L-1011.

additional thrust is required....If necessary to turn shortly after brake release, allow the airplane to gain enough momentum to carry it through the turn at idle thrust."<sup>9</sup> This same exhibit instructs that idle thrust is adequate for taxiing under most conditions, and if more than idle thrust is necessary to meet taxi requirements, symmetric thrust on Engines 1 and 2 is recommended. Even respondent's own expert witness, a Delta 727 pilot for 12 years, admitted on cross-examination that if the maintenance worker was 200 feet away on a fifteen-foot flatbed and respondent utilized an EPR value of 1.3, he would "definitely" have been concerned for the worker's safety. In fact, he testified, he would not under any circumstances, use an EPR value of 1.3. (Vol. II, TR-68)(Emphasis added). The law judge could fairly view this evidence as establishing that respondent, by using more than idle thrust to execute the turn, when he should have known that the worker was on the flatbed, failed to exercise the degree of care required of an airline

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<sup>9</sup>The Delta Airlines Operating Manual further specifies that if the engine power setting of a B-727 aircraft is at idle, at a distance of 100 feet from the exhaust nozzle the exhaust temperature would be 30 to 50 degrees and velocity would be 15 to 25 knots. At start of taxi-roll, temperature would be 90 to 95 degrees and velocity would be 35 to 50 knots. At a distance of 200 feet from the exhaust nozzle, the exhaust temperature would be 15 to 30 degrees and velocity would be 5 to 20 knots. At start of taxi-roll, temperature would be 75 to 90 degrees and velocity would be 10 to 35 knots. Ambient (outside) air temperature and velocity are also to be factored into the calculations. See Exhibit A-16. The record establishes that the temperature that day was 69 degrees fahrenheit, and there was a northwesterly wind of 9 knots. These figures appear to provide ample support for the maintenance worker's account to the effect that the jet blast was loud, hot, and strong enough that he had to hold on to keep from being blown off the fifteen-foot flatbed.

transport pilot because he executed the turn at an engine power level that potentially endangered either persons or property within an area he should have known would be placed at risk from his aircraft's jet blast.

The evidentiary ruling respondent challenges involves, as we have already noted, the maintenance worker's claim that he suffered a back injury as a result of this incident. During a deposition taken in the course of the maintenance worker's litigation against Delta, and in his testimony before the law judge, the maintenance worker denied that he had had any previous back injury. Respondent made a proffer of evidence that the maintenance worker's physician, if permitted to testify, would have stated that the worker had been treated for back pain prior to the incident which is the subject of this proceeding. Respondent believes that this evidence would have established that the maintenance worker's claim should have been rejected. We find respondent's position unavailing.

The only question before the law judge was whether respondent's actions carelessly created the potential for endangerment to the worker, not whether the worker was in fact injured by any alleged excessive application of engine power by respondent. Administrator v. Fay and Takacs, NTSB Order No. EA-3501 at 8 (1992); Administrator v. Kline, 1 NTSB 1591, 1593 (1972). In order to make that determination, the law judge only needed to decide if the worker was present where he said he was during the push back, and if so, whether he was subjected to



excessive jet blast. The law judge found that the worker was hit by an excessive jet blast which caused him to be stiff and in pain immediately after the incident. Thus, the question of whether the maintenance worker suffered any back injury prior to, or as a result of, this incident was not relevant to the merits of the Administrator's case, even though it had some bearing on the maintenance worker's credibility.<sup>10</sup> Since, however, the law judge, having seen and heard the testimony of the maintenance worker, clearly found him to be a credible witness despite the proffered deposition, any error committed in excluding such evidence was harmless at best, and provides no basis for disturbing the law judge's credibility finding in this regard.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The respondent's appeal is denied;
2. The Administrator's order, as modified by the initial decision, and the initial decision are affirmed; and
3. The 15-day suspension of respondent's ATP certificate shall begin 30 days from the date of the service of this order.<sup>11</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

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<sup>10</sup>The maintenance worker testified in his deposition that he had not been previously treated for a back injury or condition.

<sup>11</sup>For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).